(1) Supreme Court, U.S.
FILED

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No. 00-

IN THE

Supreme Court of the United States

ROBERT BOGUE,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Was your Petitioner deprived of his federal constitutional rights to due process of law and a speedy trial in view of the willful failure of Florida to comply with the applicable provisions of the Interstate Agreement and Detainers Act?

II. Do the provisions of the Interstate Agreement on Detainers Act apply to a detainer arising from the Petitioner's open sentencing matter in the state of Florida?

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OPINIONS BELOW

Annexed hereto as Appendix A is a copy of the Judgment and Memorandum Opinion of the Pennsylvania Superior Court dated December 21, 1999, affirming the lower court. Annexed hereto as Appendix B is a copy of the Opinion of the Court of Common Pleas of Montgomery County dated April 26, 1996, denying the Petition for a Writ of Habeas Corpus. Finally, annexed hereto as Appendix C is a copy of the Order of June 26, 2000 in which the Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal.

STATEMENT OF JURISDICTION

The Petitioner is asking this Court to review federal questions decided by the appellate courts of the Commonwealth of Pennsylvania. On June 26, 2000, the Supreme Court of Pennsylvania denied the Petitioner's Petition for Allowance of Appeal seeking review of a decision of the Superior Court of Pennsylvania dated December 21, 1999.

Therefore, this Petitioner is being timely filed within ninety days as permitted by Rule 13(3) and this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Extradition Clause found in Article IV, Clause 2 of the United States Constitution. This Clause provides that a person charged in any state with treason, felony or other crime, who shall flee from justice,

and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

This provision is implemented by the Uniform Criminal Extradition Act and the Interstate Agreement on Detainers Act, 42 Pa. C.S. § 9101.

STATEMENT OF THE CASE

Your Petitioner is Robert Bogue, who was arrested in Martin County, Florida on March 1, 1981 and charged with Trafficking in Cocaine in violation of Florida Statute § 893.135(1)(b) and engaging in a criminal offense while in a possession of a weapon, in violation of Florida Statute § 790.07.

The Petitioner pled guilty to these offenses on September 23, 1981. He failed to appear as required for sentencing on December 22, 1982.

On June 27, 1989, the Petitioner was arrested in Pennsylvania and charged with Possession With Attempt To Deliver Marijuana. On June 30, 1989, the Petitioner was also charged with being a fugitive from the state of Florida based upon his having failed to appear for sentencing in December of 1982.

On July 7, 1989, the District Attorney's Office of Montgomery County, Pennsylvania, advised the Martin County, Florida, State Attorney's Office to begin extradition proceedings against the Petitioner. However, the state of Florida failed to comply with that request.

On January 14, 1991, your Petitioner was sentenced in the Court of Common Pleas of Montgomery County on the marijuana distribution charge to a term of not less than 5 1/2 nor more than 11 years imprisonment.

The Petitioner was also awaiting sentencing on a federal case arising in Arizona, *United States v. Robert Bogue, et al.* In May of 1994, that Court sentenced the Petitioner to a term of 4 years in custody, said sentence to run concurrent with the aforementioned Pennsylvania state sentence.

On September 26, 1994, your Petitioner requested final disposition by the state of Florida pursuant to the Interstate Agreement on Detainers Act, Florida Statute § 941.45. In that regard, the Petitioner submitted a formal written notice and request for final disposition, as did his Florida counsel. Accordingly and in response thereto, the Pennsylvania Department of Corrections sent the appropriate documents consistent with that request to the Office of the State Attorney as well as to the Circuit Court of Martin County Florida.

The Petitioner's request for prompt disposition of the outstanding Florida charges under the Interstate Agreement On Detainers Act was partly motivated by his desire to seek a concurrent sentence, as he had obtained from the federal authorities in Arizona, based upon his extensive and substantial cooperation with a federal drug investigation. Notwithstanding this cooperation, Petitioner's Florida counsel was advised by the Assistant State Attorney for Martin County Florida that the State of Florida was not going to take any action or make any effort to transfer your Petitioner to Florida for sentencing until after the Petitioner had completed serving all of his sentences. Thus, the State

of Florida made no attempt to comply with Petitioner's repeated request for a transfer back to Florida so that he might find closure as to those criminal charges.

On April 9, 1996, your Petitioner moved to dismiss the detainer, for the failure to provide him with a speedy trial and due process of law, in the Circuit Court of the Nineteenth Judicial Circuit in and for Martin County, Florida. By Order dated May 5, 1996, that Court denied Petitioner's Motion To Dismiss without a hearing primarily because the Court took the position that the detainer lodged against the Petitioner by the State of Florida did not put him within the class of protected individuals under the Act since the detainer was not based upon "any untried indictment, information or complaint"; Florida Statute § 9401.45.

After the denial of a motion for reconsideration, the Petitioner filed a Petition for a Writ of Prohibition to the Fourth District Court of Appeals in Florida, petitioning that appellate court to prohibit the state trial judge from proceeding further in the case and requesting Petitioner's discharge.

On August 28, 1997, the Fourth District Court of Appeals filed an Opinion dismissing his Petition. *See Bogue v. Fennely*, 505 So. 2d 575 (1997). Unfortunately, there was no jurisdiction at this time to invoke the discretionary review of the Supreme Court of Florida.

On May 27, 1998, the Petitioner's Florida counsel filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 with the United States District Court for the Southern District of Florida, as per case number 98-14143. That Petition is still pending before a United States Magistrate Judge in that Court.

On June 16, 1998, the Petitioner was arrested as he was being released from custody in Pennsylvania from the service of the aforementioned sentence imposed by the Court of Common Pleas of Montgomery County. The Petitioner was thereupon charged once again with being a fugitive from justice from Florida, as officials from Martin County, Florida, had filed a criminal complaint against him under 42 Pa. C.S. § 9121, being the Uniform Criminal Extradition Act.

On June 30, 1998, the Petitioner's Pennsylvania counsel filed an application for a Writ of Habeas Corpus with the Court of Common Pleas of Montgomery County as per Docket No. 3578-98. An evidentiary hearing was held before the lower court on November 30, 1998. By Memorand "A" attached hereto, that Court ordered that the Petitioner's request for relief was denied and that he was to be extradited to the State of Florida. However, that Court also granted a subsequent application submitted on behalf of the Petitioner seeking a stay of the extradition Order pending the outcome of an appeal.

On May 6, 1999, a Notice of Appeal was duly filed to the Superior Court of Pennsylvania as per No. 1375 EDA 1999. On December 21, 1999, a Panel of the Superior Court of Pennsylvania filed a Judgment and Memorandum Opinion affirming the Order of the Court of Common Pleas of Montgomery County ordering your Petitioner's extradition to Florida. A true and correct copy of same is attached hereto as Exhibit "B".

On January 19, 2000, the Petitioner filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania seeking discretionary review of the ruling of the Superior Court. However, by Order dated June 26, 2000, a true and correct copy which is annexed hereto as Exhibit "C", that Court declined to accept review of this case.

REASONS FOR GRANTING THE WRIT

PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS HAVE BEEN ABRIDGED BY THE ORDERS OF THE PENNSYLVANIA COURTS REQUIRING YOUR PETITIONER TO BE EXTRADITED TO FLORIDA IN VIOLATION OF HIS RIGHTS OF DUE PROCESS AND SPEEDY TRIAL IN VIEW OF FLORIDA'S WILLFUL FAILURE TO COMPLY WITH THE INTERSTATE AGREEMENT ON DETAINERS ACT.

The Petitioner respectfully submits that the State of Florida has been wrongfully given another opportunity to extradite the Petitioner from Pennsylvania where the record is clear that the State of Florida has willfully failed to comply in the past with the mandatory provisions of the Interstate Agreement on Detainers Act.

This Act, found in Pennsylvania at 42 Pa. C.S. § 9101, provides an Article III(a) that a demanding state has 180 days to respond after a prisoner makes a formal request for final disposition of his charges. In the present case, on September 26, 1994, a formal request for final disposition was submitted on the Petitioner's behalf by himself and by his Florida counsel. Nevertheless, Petitioner's Florida's counsel was advised by the State's Attorney that the State of Florida was determined not to bring the Petitioner back until after he had completed serving all of his outstanding sentences, thereby effectively depriving the Petitioner of the opportunity to gain the benefit of an argument that he was entitled to a concurrent sentence (as he had already received in 1994 from a federal court in Arizona, based upon his substantial assistance to federal authorities).

As a result of Florida's arbitrary and willful refusal to timely pursue the Petitioner's extradition (since 1989), the remedy provided by the Act would be dismissal of the charges. *Carchman v. Nash*, 473 U.S. 716 (1985). In response to this contention, however, the state courts of Pennsylvania have held that under this Court's decision in *New Mexico ex rel. Ortiz v. Reed*, 118 S. Ct. 1860 (1998), the courts of that asylum state could not entertain Petitioner's legal challenges.

Your Petitioner respectfully urges this Honorable Court to grant this Petition for a Writ of Certiorari because this Court's previous ruling in *Reed, supra*, must be construed in such a way as to provide a remedy for persons in the position of this Petitioner whose substantial federal constitutional rights have been unfairly denied by the conduct of the demanding state.

As this Court stated in *Michigan v. Doran*, 439 U.S. 282 (1978), the purpose of the Extradition Clause is to "preclude any state from becoming a sanctuary for fugitives of justice from another state . . .". as well as to prevent any division of the criminal justice system among the states. The Court further stated that the intent of the Clause was to enable each state ". . . to bring offenders to trial as swiftly as possible in the state where the alleged offense was committed". *Id.* at 287. In this Court's decision in *Reed, supra*, this Court refused to allow litigation in the courts of the asylum state concerning the prisoner's claim that he might be subject to abuse in the prison of the demanding state, should he be returned to that state as requested. This Court ruled that issues relating to what had happened in the demanding state, and what could be expected to happen to the fugitive when he returned, should be left for the courts of the demanding state to determine. 118 S. Ct. at 1861.

In the instant case however, your Petitioner has not requested the courts of the asylum state to litigate issues that are open to him to try in the demanding state.[1] Furthermore, the Petitioner has not requested that the Pennsylvania Courts decide any factual issues regarding mitigation of his situation in Florida, but rather has only asked that the provisions of the IAD be enforced in the asylum state's courts.

The Interstate Agreement on Detainers Act is a federal law subject to federal construction. *Cuyler v. Adams*, 449 U.S. 433, 442 (1981). The purpose of the Act is to encourage the expeditious and orderly disposition of outstanding charges, *United States v. Mauro*, 436 U.S. 340, 343 (1978). Surely the provisions of the Act need to be enforced in a case where the demanding state has willfully and capriciously refused to follow the procedures under the Act and has allowed the Petitioner to sit and rot in a Pennsylvania prison until his federal and Pennsylvania sentences are served, before it will comply.

Even under the standards promulgated in *Reed, supra*, extradition would not have been appropriate in this case because the Petitioner is not, in the true sense of the term, a "fugitive" at this time. While it is true that the Petitioner was at one time a "fugitive" in that he failed to appear for sentencing in Florida in 1982, that status ended when he became a person in the custody of the asylum state in 1989. At the very least, it is clear that the Petitioner was no longer a "fugitive" at the time he invoked his request for transfer to Florida under the Interstate Agreement on Detainers Act in 1994.

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1. The Petitioner notes that his request for from relief from the detainer under the IAD has been rejected by the Florida state courts.

As Mr. Justice Stevens stated in his dissenting Opinion in *California v. Superior Court*, 482 U.S. 400, 419 (1987),

> To be a fugitive from justice, it is necessary that having within a state committed that which by its laws constitutes a crime, **when he is sought to be subjected to its criminal process to answer for his offense**, he has left its jurisdiction and is found within the territory of another.

By 1994, the Petitioner was clearly no longer a "fugitive from justice" and Pennsylvania was certainly not "a sanctuary" or "haven" for the Petitioner's refuge from the state of Florida as he had clearly evidenced his willingness to be transferred back to that state to answer to the charges.

Finally, the Petitioner respectfully submits that notwithstanding this Court's decision in *Carchman v. Nash*, *supra*, (holding that the provisions of the Interstate Agreement of Detainers Act do not apply to a detainer arising from a violation of probation), a detainer arising from an open sentencing matter does place the Petitioner within the class of protected individuals under the Act.

Unlike a violation of probation proceeding where the prisoner is not necessarily accused of having committed a criminal offense, the sentencing proceeding is actually part of the "trial" itself so that the Petitioner can fairly argue to the Court that he is still an "untried" prisoner. As this Court recently made clear in *Mitchell v. United States*, 119 S. Ct. 1307 (1999), "to maintain that sentencing proceedings are not part of any criminal case is contrary to the law and common sense". 119 S. Ct. at 1314. Accordingly, this Court

held based upon that reasoning that it would accord the privilege against self incrimination the same protection in a sentencing phase as it would at a trial.

The United States Court of Appeals for the Third Circuit held in *Burkett v. Cunningham*, 826 F.2d 1208 (1987), that a sentencing is part of a trial for the purposes of the right to a speedy trial under the Sixth Amendment. As Chief Judge Becker of the Third Circuit stated, the right to a speedy trial continues until it is determined for how long the accused should be incarcerated.

In *Tinghitella v. California*, 718 F.2d 308 (9th Cir. 1983) and *Hall v. Florida*, 678 F. Supp. 858 (N.D. Fla. 1987), it was held that the Interstate Agreement on Detainers Act does apply to a detainer arising from an open sentencing matter on the ground that the term "trial" does in fact include the sentencing phase of criminal case. In Article IX, it is stated that the Act is to be "liberally construed". In this case, the Act should be construed so that it will be enforced, notwithstanding the Uniform Criminal Extradition Act. Here, the State of Florida has willfully chosen to ignore the requirements of the IAD and has purposely caused your Petitioner to be detained for an extended period of time in the asylum state, thus leaving your Petitioner in a state of great anxiety and uncertainty about the future of his case in that jurisdiction. This is just the sort of uncertainty and anxiety that the Act was intended to prevent.

Accordingly, your Petitioner Robert Bogue respectfully invokes this Court's jurisdiction and prays that the Supreme Court of the United States accept this matter for further review so that his federal constitutional rights to due process of law and to a speedy trial should not be further abridged.

CONCLUSION

Your Petitioner Robert Bogue respectfully requests this Honorable Court to act in the interests of fundamental fairness and justice and grant this Petition.

Respectfully submitted,

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